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APPENDIX

Supreme Court of the United States

October Term, ~~1968~~ 1969 / 1970

No. ~~580~~ 47

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Appellants,

—*v.*—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPEAL DOCKETED SEPTEMBER 27, 1968
PROBABLE JURISDICTION NOTED DECEMBER 9, 1968

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UNITED STATES DISTRICT COURT
For the Southern District of New York

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Docket Entries

Date	Proceedings
March 12, 1968	Filed complaint and issued summons.
March 15, 1968	Filed Order to Show Cause re: 3-Judge Court, etc.—Ret. 3/19/68.
March 19, 1968	Filed (in Court) [defendants'] affidavit in opposition.
April 9, 1968	Filed Memorandum Opinion #34631, Bryan, J.
April 22, 1968	Filed order designating Friendly, C.J., Wyatt, J. & Bryan, J. as 3 Judge Court—Lumbard, Ch.C.J.
April 30, 1968	Filed deft's (Louis J. Lefkowitz, Atty Gen'l., State of N.Y.) ANSWER.
April 30, 1968	Filed deft's (Thomas J. Mackell, D.A., Queens Cty.) ANSWER.
May 6, 1968	Filed [plaintiffs'] Motion for Summary Judgment under Rule 56—Ret. Room 1505 on 5/17/68.

Docket Entries

Date	Proceedings
May 10, 1968–	Filed Amended and Supplemental ANSWER of Thomas J. Mackell. (Samuels, etc. v. Mackell)
May 15, 1968–	Filed Affidavit of Paul Livoti.
May 17, 1968–	Before 3 Judge Court–Hearing held & concluded. Decision reserved.
June 26, 1968–	Filed 3 Judge Court OPINION #34931—Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed for by the State.—Friendly, C.J., Bryan, J. & Wyatt, J.–mailed notice. JUDGMENT Ent. Clerk
July 15, 1968–	Filed Notice of Motion before a 3 Judge Court (Friendly, Bryan & Wyatt), re: Enjoin defendant.
July 15, 1968–	Filed Notice of Appeal.
July 22, 1968–	Filed Affidavit of Peter J. O'Connor in behalf of deft. Attorney General.
July 22, 1968–	Filed MEMO. END. on motion papers filed 7/15/68. Upon the consent of counsel for the defendant the within motion for a stay is granted, conditioned upon the diligent prosecution of the appeal taken by plaintiffs to the Supreme Court of the U.S. Friendly, U.S.C.J., and Bryan, U.S.D.J.
[Sept. 27, 1968–	Appeal docketed]
Dec. 16, 1968–	Filed true copy of Supreme Court—U.S. order that probable jurisdiction is noted; and cases are consolidated. [Also in 68 Civ. 1176.]

Complaint for Declaratory Judgment and Injunction

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Plaintiffs, by Rabinowitz, Boudin & Standard, for their complaint, allege:

1. Plaintiffs are black citizens of the United States and residents of the State of New York. Plaintiffs are interested in, and participate in many activities for, the attainment of equality and freedom for all Negro citizens. To achieve these ends, plaintiffs engage in many forms of legitimate protest activities protected by the First and Fourteenth Amendments, including, but not limited to, participation in demonstrations, community organization rallies, discussion groups and the distribution of printed and written matter setting forth facts and argument in support of their views. Plaintiffs seek to attain their objectives through the utilization of their fundamental rights of free speech, press and assembly, as well as the right to petition their Government for a redress of their grievances and those of their fellow citizens.

2. Defendant Thomas J. Mackell is a citizen of the United States and, upon information and belief, a resident of the County of Queens, City and State of New York. He is the District Attorney for the County of Queens in the City and State of New York, and is sued herein in both his individual and official capacity.

3. Defendant Louis J. Lefkowitz is a citizen of the United States and, upon information and belief, a resident of the

County of New York, City and State of New York. He is the Attorney General for the State of New York and is sued herein in both his individual and official capacity. As Attorney General, he has the power and duty, under §71 of the Executive Law of the State of New York, to appear in litigation in which a question of the constitutionality of a state statute is raised.

4. This court has jurisdiction over this action under 28 U.S.C. §§1343(3), 2201, 2202 and 42 U.S.C. §1983. One of the purposes of this action is to enjoin enforcement of a State statute. Hence a three-judge court is required to be convened under 28 U.S.C. §§2281 and 2284.

5. The defendant Mackell, acting under color of certain statutes of the State of New York, specifically former §§160, 161, 163 and 580(1) of the Penal Law, has embarked on a course of conduct designed to subject the plaintiffs and others similarly situated to the deprivation of the rights, privileges and immunities secured to them by the Constitution and laws of the United States, by commencing a prosecution against them and by threatening to continue said prosecution.

6. Pursuant to said unlawful design, defendant Mackell on or about June 12, 1967, obtained from the Grand Jury of the County of Queens an indictment against the plaintiffs and others similarly situated, charging plaintiffs and others with violation of the aforesaid statutes, as well as other provisions of the Penal Law of New York; said indictment bears No. 1224-67.

7. Thereafter, the defendant Mackell caused plaintiffs and others named in the indictment to be arrested by officers of the New York City Police Department and to be arraigned in the Supreme Court of New York State in Queens County. Upon

the arraignment of the said plaintiffs, the defendant Mackell issued numerous press releases and other public statements relating to the indictment and arrest of the plaintiffs, which releases and statements were widely reported in newspapers throughout the State of New York.

8. On or about January 10, 1968, demurrers to certain counts of the said indictment were sustained by the Supreme Court of the State of New York, County of Queens, and the indictment was dismissed.

9. On or about January 17, 1968, defendant Mackell, in further pursuance of the aforesaid unlawful design, obtained a new and superseding indictment, bearing No. 134-68, from the Grand Jury of Queens County, New York; said superseding indictment similarly charged plaintiffs and others with violation of former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and with the violation of other provisions of said law. A copy of said superseding indictment is annexed hereto.

10. Former sections 160, 161, 163 and 580(1) of the Penal Law of New York are void on their face and as applied to the plaintiffs and to the other persons named in said indictment in that they violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States, being in violation of the guarantees of free speech, press and assembly provided in said amendments; furthermore, said statutes are vague and indefinite in violation of the guarantee of due process of law. In addition, §§160, 161 and 163 are unconstitutional in that these sections have been superseded by Tit. 18 U.S.C. §2385 (the Smith Act), by which Congress has preempted the field of legislation in the general area covered by the aforesaid statutes of the State of New York.

11. The purpose and effect of the aforesaid indictments and of the publicity which attended them was to inhibit the plaintiffs and others in the exercise of their rights of free speech, press and assembly; to so intimidate them and others similarly situated that they would hesitate to express their views on subjects of great national importance through fear of prosecution and imprisonment for long terms of years and to cause them to cease speaking and assembling and distributing printed and written material in support of the principles which they hold dear, as set forth in paragraph 1 hereinabove, because of fear of unjust imprisonment.

12. Unless this court restrains the operation and enforcement of these unconstitutional statutes, the plaintiffs and others similarly situated, including the other persons named in the indictment, will continue to suffer immediate and irreparable injury, in that they will continue to be persecuted and will be deterred, hindered and prevented from exercising their constitutional rights.

13. The Grand Jury which returned the aforesaid indictments was selected, drawn and summoned pursuant to former §§596 and 609 of the Judiciary Law of the State of New York; said sections violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that they impose a monetary qualification for grand jury service and the standards which they set for jury service are subjective standards, thus vesting the County Clerk with arbitrary power in the selection of Grand Jurors.

14. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray for the following relief:

1. That, pursuant to 28 U.S.C. §§2281 and 2284, a three-judge court be convened to hear and determine this proceeding;

2. That a permanent injunction be issued, restraining the defendants, their agents, employees and all others acting in concert therewith, from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions thereunder.

3. That a declaratory judgment be issued declaring that former sections 160, 161, 163 and 580(1) of the Penal Law are null and void on their face and, as applied to the plaintiffs herein, being in violation of the United States Constitution.

4. That a declaratory judgment be issued declaring that former sections 596 and 609 of the Judiciary Law are null and void on their face and as applied to the indictment of the plaintiffs herein, being in violation of the United States Constitution;

5. That, pending the hearing and determination of the requests for permanent relief, an interlocutory injunction be issued restraining the defendant, his agents and employees and all others acting in concert therewith from prosecuting the plaintiffs and from enforcing or attempting to enforce in any way the provisions of former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York; and

6. For such other and further relief which to this Court may seem just and proper.

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Indictment, Annexed to Complaint

SUPREME COURT—CRIMINAL TERM
QUEENS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED FERNANDEZ, ARTHUR HARRIS, AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, MANDOLA McPHERSON, HARRIET NOEL, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH, MAX STANFORD, a/k/a Maxwell Curtis Stanford, MERLE STEWART, ABRAHAM C. TAYLOR, URSULA VIRGINIA WEST,

Defendants.

No. 134-68 Indictment Superseding Indictment For: No. 1224-67

Advocacy of Criminal Anarchy as to All Defendants. Conspiracy to Commit the Crime of Advocacy of Criminal Anarchy as to All Defendants.

Conspiracy to Commit the Crime of Arson in the Third Degree as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor.

Permitting Premises to be used for Assemblages of Anarchists as to Merle Stewart and George Samuels.

Indictment, Annexed to Complaint

Possession of Weapons and Dangerous Instruments and Appliances as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Arthur Harris, Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Merle Stewart and Abraham C. Taylor.

First Count:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law §161 subdivision 1, as added by chapter 371 §1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally advocate by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

Indictment, Annexed to Complaint

Second Count:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law §160 and §161 subdivision 2, as added by chapter 371 §1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally print, publish, edit, issue, circulate, distribute and display certain papers and documents entitled, "Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U.S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished.

Third Count:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law §160 and §161 subdivision 4, as added by

chapter 371 §1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally organize and help to organize and become a member of and voluntarily assemble with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

Fourth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Conspiracy as a misdemeanor, contrary to former penal law §580, subdivision 1, as amended by chapter 893, §6 of the laws of 1957, and chapter 611, §1 of the laws of 1959, to commit a crime other than illegally selling narcotics or extortion, to wit: the crime of advocacy of criminal anarchy, contrary to the former penal law, §161, subdivisions 1, 2 and 4, as added by chapter 371, §1 of the laws of 1902,

in that the said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to advocate criminal anarchy, by the following means, among others: by advocating by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; by printing, publishing, editing, issuing, circulating, distributing and displaying certain papers and documents entitled, "Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U.S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means; and by organizing and helping to organize and

becoming a member of and voluntarily assembling with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; all with the further intent that said acts be presently attempted and accomplished.

Overt Acts

In furtherance of said conspiracy, the following acts beside such agreement were done to effect the object thereof by one or more of the parties to such agreement:

In order to effect the object thereof under subdivision 1, §161 of the former penal law:

1. On or about the 5th day of October, 1965, the defendants Herman Benjamin Ferguson and Milton Ellis, a/k/a Clarence Milton Ellis, and others known to the grand jury, discussed the importance of being proficient in terror tactics.

2. On or about the 9th day of December, 1965, the defendants acting in concert formed a certain gun club to be used as a cover and front for the possession of pistols and rifles.

3. On or about and between the 1st day of October, 1965 and the 21st day of June, 1967, the defendants acting in concert obtained rifles, shotguns and pistols.

Indictment, Annexed to Complaint

4. On or about the 15th day of February, 1966, the defendants Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson and Hampton Woodward Rookard, and others known to the grand jury, discussed the use of pipes and gunpowder for the making of bombs.

5. On or about the 12th day of July, 1966, the defendants Abraham C. Taylor, Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Hampton Woodward Rookard, and others known to the grand jury discussed tactics to be used in guerrila warfare.

6. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and possessed in the county of Queens an indeterminate amount of gun powder for making explosives.

7. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and stored cans of gasoline.

In order to effect the object thereof under subdivision 2, §161 of the former penal law:

8. On or about the 7th day of June, 1966, the defendants Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson and Merle Stewart discussed the printing of literature on how to launch an explosive with a rifle.

9. On or about the 9th day of July, 1966, the defendants Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson and Merle Stewart discussed the printing of literature on how to disable Police Cars.

10. On or about the 13th day of September, 1966, the defendants Herman Benjamin Ferguson, Arthur Harris, Mandola

McPherson, Hampton Woodward Rookard, and others known to the grand jury, prepared and discussed a "Community Self Defense" leaflet.

11. On or about the 23rd day of April, 1967, the defendants distributed literature "The Struggle for Black State Power in the U.S."

In order to effect the object thereof under subdivision 4, §161 of the former penal law:

12. On or about the 12th day of July, 1966, the defendants Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Abraham C. Taylor and Ursula Virginia West met and discussed tactics on Guerrilla Warfare.

13. On or about the 13th day of September, 1966, the defendants Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels and Ursula Virginia West met and discussed "Community Self Defense" leaflets.

14. On or about the 20th day of September, 1966, the defendants Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, Merle Stewart and Ursula Virginia West met and discussed literature "The Struggle for Black State Power in the U.S."

15. On or about the 4th day of April, 1967, the defendants Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Raymond Smith and Abraham C. Taylor met and discussed organizing the youth for acts of violence in Queens County.

16. On or about the 22nd day of January, 1967, the defendants Al Haynes a/k/a Edward Albert Haynes, Michelle

Indictment, Annexed to Complaint

Kaurouma, Harriet Noel and Max Stanford, a/k/a Maxwell Curtis Stanford, met and discussed the use of the Black Guard to take care of Traitors and Uncle Toms.

17. On or about the 12th day of February, 1967, the defendants Michelle Kaurouma, Harriet Noel and others met and discussed the use of disguise kits in terror tactics.

18. On or about the 16th day of April, 1967, the defendants Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, and Harriet Noel met and discussed the group's role as revolutionaries.

19. On or about the 23rd day of April, 1967, the defendants Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Harriet Noel and Max Stanford, a/k/a Maxwell Curtis Stanford, met and discussed the literature, "The Struggle for Black State Power in the U.S."

Fifth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor of the following crime: Conspiracy as a felony, contrary to the former penal law §580-a., as added by chapter 611 §2, of the laws of 1959, to commit the crime of arson, to wit: the crime of arson in the third degree, contrary to the former penal law, §223, as amended by chapter 154 of the laws of 1913 and chapter 895 of the laws of 1936, in that the said persons aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand

jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to wilfully burn and set on fire certain public transportation facilities and certain premises used for storage of tires and lumber, all located in the county of Queens, by use of ignited gasoline and other incendiary means.

Overt Acts:

In furtherance of said conspiracy, the following acts beside the agreement to commit such crime were done to effect the object of the agreement by one or more of such persons:

1. On or about the 26th day of April, 1967, the defendants Herman Benjamin Ferguson and Arthur Harris marked the locations of two lumber yards and tire company on a Queens map.

2. On or about the 26th day of April, 1967, the defendants Herman Benjamin Ferguson and Arthur Harris went to the vicinity of Sutphin Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a lumber yard.

3. On or about the 29th day of April, 1967, the defendant Arthur Harris went to the vicinity of New York Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a tire company.

4. On or about the 5th day of May, 1967, the defendants, acting in concert, in the County of Queens, obtained and stored cans of gasoline.

Indictment, Annexed to Complaint

5. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and stored an indeterminate amount of gun powder.

Sixth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse George Samuels of the following crime: Permitting premises to be used for assemblages of anarchists, contrary to the former penal law, §163, as added by chapter 371, §1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 120-03 New York Boulevard, an assemblage of persons assembled for the purpose of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

Seventh Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Merle Stewart of the following crime: Permitting premises to be used for assemblages of anarchists, contrary to the former penal law, §163, as added by chapter 371, §1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 111-29 179th Place, an assemblage of persons assembled for the purpose

of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

Eighth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434047; model number X15, contrary to former penal law §1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

Ninth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle; serial number P4230; model number 1915; manufacturer, Bresca; description: brown cover contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Tenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 12 gauge double barrel shotgun; manufacturer: National Arms Company; police department city of New York serial number A44662.

contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Eleventh Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 21002; manufacturer: Savage; description: brown case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twelfth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Milton Ellis, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number DM 15; manufacturer: Remington; contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 7.65 calibre pistol; serial number 768073; manufacturer: Barreta, contrary to former penal law §1897, subdivision 2, as amended by chapter 136 of the laws of 1963.

Indictment, Annexed to Complaint

Fourteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74718; manufacturer: Armalite, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Fifteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number 120A; manufacturer: Springfield; description: .22 calibre scope, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Sixteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.5 calibre rifle; serial number A57027; manufacturer: Italian; description: brown case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Seventeenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following

Indictment, Annexed to Complaint

crime: Possession of weapons and dangerous instruments and appliances, to wit, one shotgun; serial number 68521; manufacturer: Stevens, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Eighteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 14245; manufacturer: Remington; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Nineteenth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 16747; manufacturer: Remington; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twentieth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 24903; manufacturer: Remington; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Indictment, Annexed to Complaint

Twenty-first Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 26448; manufacturer: Remington; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-Second Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 5718214; manufacturer: H&R; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-third Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1102168; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-fourth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following

crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2511161; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-fifth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2016256; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-sixth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1022954; description: green case, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Twenty-Seventh Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Herman Benjamin Ferguson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Eagle carbine rifle; serial number 25135, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Indictment, Annexed to Complaint

Twenty-Eighth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Arthur Harris of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434015; manufacturer: Galesi, contrary to former penal law §1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

Twenty-ninth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Arthur Harris of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74089; manufacturer: Armalite, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirtieth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Arthur Harris of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre rifle; serial number 4102779, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty first Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Arthur Harris of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Eagle carbine rifle; serial number 25068, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Indictment, Annexed to Complaint

Thirty-second Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Al Haynes, a/k/a Edward Albert Haynes, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 254398; model X15, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-third Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Michelle Kaurouma of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 78096; manufacturer: Armalite, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-fourth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Mandola McPherson of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number 81DL; manufacturer: Marlin; description: scope, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-fifth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard of the following crime: Possession of weapons and dangerous instruments and

appliances, to wit, one rifle .22 calibre, serial number 6329, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-sixth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Remington rifle, serial number 141408, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-seventh Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 30-30 Marlin rifle, serial number P12648, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-eighth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Winchester rifle, serial number 1141630, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Thirty-ninth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard of the follow-

Indictment, Annexed to Complaint

ing crime: Possession of weapons and dangerous instruments and appliances, to wit, one Noble double barrel shotgun, AB 18013, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Fortieth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle, Stevens model 87; .22 calibre, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-first Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Hampton Woodward Rookard of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 503917; manufacturer: Winchester, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-second Count:

The grand jury of the county of Queens, by this count in this indictment, accuse George Samuels of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 95232; manufacturer: Reck, contrary to former penal law §1897, subdivision 3 [sic], as amended by chapter 136 of the laws of 1963.

Indictment, Annexed to Complaint

Forty-third Count:

The grand jury of the county of Queens, by this count in this indictment, accuse George Samuels of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one New England West. rifle; serial number 683459, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-fourth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse George Samuels of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; manufacturer: Marlin, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-fifth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Merle Stewart of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun; antenna barrel bound in black plastic tape; police department, city of New York, serial number 36071, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-sixth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Merle Stewart of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun antenna barrel bound in black plastic tape;

Indictment, Annexed to Complaint

police department, city of New York, serial number 36072, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-seventh Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Merle Stewart of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 71387; manufacturer: Armalite, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

Forty-eighth Count:

The grand jury of the county of Queens, by this count in this indictment, accuse Abraham C. Taylor of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one carbine rifle; serial number 4070, contrary to former penal law §1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

DISTRICT ATTORNEY

Order to Show Cause

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Upon the annexed affidavits of Victor Rabinowitz, sworn to the 11th day of March, 1968 and George Samuels, sworn to the 8th day of March, 1968:

It is hereby ordered, that the respondents show cause before a Judge of this Court in the United States District Courthouse in Room 506 thereof, Foley Square, Borough of Manhattan, on the 19th day of March, 1968 at 9:30 A.M. or as soon thereafter as counsel can be heard why a three-judge statutory court should not be convened pursuant to 28 U.S.C. §§2281 and 2284 and why such court should not issue a temporary injunction enjoining the defendants from continuing to prosecute the plaintiffs and from enforcing against them the provisions of Former Sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York.

It is further ordered, that a copy of this order, together with the papers upon which it is granted, be served upon the respondents on or before the 12th day of March, 1968 at 5:00 P.M. and that such service shall be deemed good and sufficient service.

Dated: New York, N.Y.
March 12, 1968

/s/ William B. Herlands
U.S.D.J.

Affidavit of Victor Rabinowitz in Support of Order to Show Cause

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

State of New York)
County of New York) ss.:

Victor Rabinowitz, being duly sworn, deposes and says:

I am a member of the firm of Rabinowitz, Boudin & Standard, the attorneys for the plaintiffs in the above-entitled action. I make this affidavit in support of an application for an order to show cause why a three-judge statutory court should not be convened, and why such court should not issue a temporary injunction to enjoin the defendants from continuing to prosecute the plaintiffs and from enforcing against them the provisions of former Sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York.

This affidavit is made by deponent, instead of a plaintiff because the facts set forth are within deponent's personal knowledge.

On or about June 12, 1967 an indictment was filed in the Supreme Court, County of Queens, charging plaintiffs with having violated former Sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York. This indictment was subsequently dismissed and on or about January 17, 1968 a new indictment (No. 134-68) was filed.

Affidavit of Victor Rabinowitz

Defendants are actively prosecuting the case against the plaintiffs. Plaintiffs have filed pre-trial motions addressed to the indictment. Many of these motions have been decided; others are under consideration of this Court. Defendant Mackell has stated that he intends to press for a trial of the said indictment. Upon information and belief, the case will be placed on the trial calendar, Supreme Court, County of Queens, Criminal Part within the next several weeks.

This application is made by order to show cause in order that the questions raised can be heard without undue delay and to secure, if possible, a decision on the merits before the case is reached for trial. Furthermore, additional time will be needed in this court to convene the three-judge statutory court requested by the motion herein.

No prior application has been made for the relief requested herein.

WHEREFORE, deponent requests that the relief requested herein be granted.

/s/ Victor Rabinowitz

(Sworn to March 11, 1968.)

Affidavit of George Samuels in Support of Order to Show Cause

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

State of New York)
County of New York) ss.:

George Samuels, being duly sworn, deposes and says:

I am one of the plaintiffs in the above action and make this affidavit in support of a motion for a temporary injunction to enjoin the defendants from continuing to prosecute the plaintiffs and from enforcing against them the provisions of former Sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York on the ground that said statutes violate the First, Fifth and Fourteenth Amendments of free speech, press and assembly.

Furthermore, the indictment was returned by a grand jury which was improperly chosen in violation of the Fourteenth Amendment in that former §596 of the Judiciary Law of New York provides that only persons having personal property to the value of $250.00 shall serve on a grand jury. §609 of the Judiciary Law also provides a subjective test for grand jurors, enabling the county clerk to exercise arbitrary power in choosing the grand jurors.

Since the relief sought is to enjoin the application of a state statute plaintiffs also move for an order pursuant to

Title 28 U.S.C. 2281 and 2284 directing that a three-judge statutory court be convened to pass upon this motion.

On or about June 21, 1967 I was arrested pursuant to an indictment which had been filed on June 12, 1967. Upon the arraignment of the plaintiffs, the defendant Mackell issued numerous press releases and other public statements relating to the indictment and arrest of the plaintiffs, which releases and statements were widely reported in newspapers throughout the State of New York. A copy of some of these releases and public statements is annexed hereto.

This indictment was subsequently dismissed and on or about January 17, 1968 a new and superseding indictment No. 134-68 was filed. A copy of said indictment is annexed hereto.

This indictment alleges that I violated former Sections 160, 161 and 163 of the Fenal Law by engaging in the crime of criminal anarchy. I am alleged to have advocated by word of mouth and by the distribution of certain documents the desirability of overthrowing the government of New York State. In addition, the indictment charges me with conspiracy to commit the crime of advocacy of criminal anarchy in violation of former Section 580(a) of the Penal Law. Finally, the indictment charges me with permitting my premises to be used for the assembling of anarchists in violation of former Section 163 of the Penal Law.

A complaint has been filed in this Court seeking to declare the above-mentioned sections of the Penal Law unconstitutional. The complaint alleges, in brief, that the sections are void on their face and as applied to the plaintiffs and to the other persons named in said indictment in that they violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States, being in violation of the guarantees of free

speech, press and assembly provided in said amendments; furthermore, said statutes are vague and indefinite in violation of the guarantee of due process of law. In addition, it is alleged that §§160, 161 and 163 are unconstitutional in that these sections have been superseded by Tit. 18 U.S.C. §2385 (the Smith Act), by which Congress has preempted the field of legislation in the general area covered by the aforesaid statutes of the State of New York.

The complaint further alleges that the purpose of the indictment and of the publicity was to prevent me and other plaintiffs from exercising our guaranteed rights of free speech, press and assembly since we would hesitate to express our views on subjects of great national importance through fear of prosecution and imprisonment for long terms of years.

For many years I have been active in community groups in Manhattan, Brooklyn and Queens concerned with the serious problems confronting the black residents of those boroughs. I have been particularly concerned with matters such as poverty, crime, narcotics addiction, housing, employment and related matters. I have many times in the past worked closely with the Bedford-Stuyvesant Youth in Action, the Community Council of Brooklyn, the NAACP, the National Urban League, the Baptist and Episcopal churches and many other groups. Almost all of my spare time has been devoted to such activities and related work, all designed to better the conditions of the black people of the city, almost all of whom are poor and are subjected to continuous discrimination.

The same is true of many of my co-defendants in the criminal action, although I cannot swear as to all of them, since there are some I do not know.

Affidavit of George Samuels

My work among the black residents of the city has been adversely affected by the indictments. I have needed a loan to carry on my business, but have been unable to get one because the indictment is pending. Most of the other defendants here have lost their jobs, and some have found it difficult to get new ones. The indictments have also caused much undue confusion and alarm in the community and have made it more difficult to carry on the work I have been engaged in for years. Many of the people are unwilling to read some of the written material which is being circulated in the community; some are afraid to associate publicly with some of the defendants and our ability to spread our ideas and to carry on our work has suffered as a result.

The result has been a "chilling" effect on the constructive work we have been trying to do in the community and unless this court enjoins the pending prosecution we will be seriously affected in that endeavor.

WHEREFORE, plaintiffs pray that a three-judge statutory court be convened and that said court enjoin the defendants from continuing the aforementioned prosecutions.

/s/ George Samuels

(Sworn to March 8, 1968.)

[Press Releases and Public Statements annexed to Affidavit of George Samuels have been omitted]

Affidavit of Peter J. O'Connor in Opposition

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

State of New York)
County of Queens) ss.:

Peter J. O'Connor being duly sworn deposes and says:

1. Deponent is an Assistant District Attorney of Queens County, State of New York, of counsel to Thomas J. Mackell, District Attorney of Queens County, and is appearing herein as attorney for the defendant, Thomas J. Mackell. Deponent is admitted to practice before this court. Deponent makes this affidavit upon personal knowledge of proceedings heretofore had in the Supreme Court of Queens County and upon information contained in the files and records of the District Attorney of Queens County.

2. This affidavit is in opposition to plaintiffs' motion to convene a three judge statutory court and for a temporary injunction.

3. Plaintiffs were indicted on or about June 12, 1967 in the Supreme Court, Queens County, State of New York and charged therein, inter alia, of having violated Sections 160, 161, 163 and 580, subd. 1 of the former Penal Law, State of New York, to wit, advocacy of criminal anarchy, permitting premises to be used for assemblages of anarchists, and conspiracy to commit the crime of advocacy of criminal anarchy.

4. The aforesaid indictment, numbered 1224 of 1967, was dismissed on or about January 17, 1968 after the court sus-

tained demurrers (interposed by plaintiffs) for various deficiencies in the form of the indictment. The court however granted leave to the District Attorney to re-present the case to the same or another Grand Jury.

5. On or about January 17, 1968 a superseding indictment numbered 134 of 1968 was handed up by the Grand Jury, in which the plaintiffs are charged, inter alia, with the same crimes as set forth in paragraph 3 above.

6. Since the filing of the original indictment in June, 1967 the plaintiffs have made numerous, exhaustive motions attacking the original and superseding indictments in which, among other things, they have charged the District Attorney with unfair publicity, have attacked the composition and constitutionality of the Grand Jury, and have questioned the constitutionality of Sections 161, 162 and 163 of the former Penal Law. Each of these motions has been denied on the merits with respect to both indictments. Annexed hereto and marked Exhibit "A" is the memorandum opinion of the Supreme Court of Queens County (Shapiro, J.) dated January 5, 1968 in which the court ruled upon two of the issues, i.e., the alleged publicity and the constitutionality of the subject provisions of the former Penal Law. Annexed hereto and marked Exhibit "B" is the memorandum opinion of the Supreme Court, Queens County (Shapiro, J.) dated March 4, 1968 in which the court ruled upon the issue of selection and composition of the Grand Jury, and also annexed and marked Exhibit "C" is the memorandum opinion of the Supreme Court of Queens County, dated January 2, 1968 (55 Misc. 2d 711), ruling upon other aspects of the Grand Jury selection.

7. Not only has each of the issues raised herein been raised before in the State Court, but each has been thoroughly briefed

by the parties and thoroughly reviewed and decided by an able and scholarly jurist.

8. The action commenced herein by plaintiffs, and the instant motion, are attempts to have this court sit as an appellate court to review the holdings of the Supreme Court of the State of New York. Nothing set forth in the complaint or in the moving papers herein indicates that the plaintiffs have exhausted their state remedies, nor is there any substantial factual showing that a Federal question is involved which confers jurisdiction upon this court. Indeed, there is not even an allegation that plaintiffs are being deprived of any constitutional rights or that they have been or will be denied due process of law in the State Courts. The complaint and affidavits fail to show the facts whereby or which cause a denial of or inability to enforce in the State Courts of the State of New York any right secured to the abovenamed plaintiffs by any law providing for the equal civil rights of citizens of the United States or of persons within the jurisdiction thereof.

9. The constitutionality of the anarchy provisions of the former Penal Law of the State of New York was upheld by the New York State Court of Appeals in *People* v. *Epton*, 19 N.Y. 2d 496 and certiorari has recently been denied by the United States Supreme Court, ____ U.S. ____.

10. Plaintiffs also fail to show any substantial legal grounds for the granting of a temporary injunction.

11. The commencement of this action is a further attempt to delay the prosecution of the plaintiffs for violations of the State Penal Statutes, and is a further attempt to confound and confuse the courts by a multiplicity of motions and legal maneuvers to unduly engage and divert the prosecution.

Affidavit of Peter J. O'Connor

12. A similar action (and motion) has been filed in the Eastern District Court on behalf of another defendant of the aforesaid indictment, causing the District Attorney of Queens County to respond and appear in two Federal Courts simultaneously while proceedings continue in the Supreme Court of Queens County.

13. A Memorandum of Authorities is being submitted herewith which will set forth defendant's legal points in opposition of this motion and in relation to the jurisdiction of this action.

WHEREFORE defendants respectfully pray that the instant motion be denied in all respects, and for such other and further relief as to this court may seem just and proper.

/s/ Peter J. O'Connor

(Sworn to March 15, 1968.)

[Exhibits A, B, C, annexed to foregoing affidavit of Peter J. O'Connor, Esq., have been omitted.]

Memorandum Opinion of Bryan, D.J.

UNITED STATES DISTRICT COURT
Southern District of New York

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68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

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68 Civ. 1176

FRED FERNANDEZ,

Plaintiff,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

MEMORANDUM

BRYAN, *District Judge:*

The eleven plaintiffs in these two actions are under indictment in the New York Supreme Court, Queens County, for, among other crimes, advocacy of criminal anarchy, conspiracy

to commit criminal anarchy and permitting premises to be used for assemblages of anarchists under former New York Penal Code Sections 160, 161 and 163.[1]

These actions in which the District Attorney of Queens County and the New York Attorney General are named as defendants, seek judgments declaring that the New York criminal anarchy laws under which plaintiffs were indicted and New York statutes governing selection of the members of the grand jury which indicted them, are unconstitutional. They ask for a permanent injunction against further prosecution of these charges or enforcement of the criminal anarchy statutes and preliminary injunctive relief to the same effect. Pursuant to 28 U.S.C. §2281, plaintiffs request that their application be heard by a District Court of three judges designated pursuant to 28 U.S.C. §2284.

Plaintiffs claim that the New York criminal anarchy laws are unconstitutional on their face and as applied in that they curtail First Amendment freedoms of speech, press and assembly and are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments. It is alleged that these laws were superseded by the Smith Act, 18 U.S.C. §2385 and are unconstitutional for that reason also.

The plaintiffs also claim that the grand jury which indicted them was unconstitutionally drawn. They challenge on Fifth and Fourteenth Amendment grounds the requirements of §596 of the New York Judiciary Law that a grand juror must "be the owner of real or personal property of the value of two hundred and fifty dollars"[2] and must "be intelligent, of sound

[1] The criminal anarchy laws under which the plaintiffs were indicted have been superseded by Section 240.15 of the new Penal Law.

[2] The requirement of property ownership is no longer in force, having been omitted by amendments to Sections 596 and 661, effective September 1, 1967. When the indictment against the plaintiffs was drawn, the property requirement was in effect.

mind and good character, well informed; able to read and write the English language understandably." Sections 609 and 661, which contain allegedly subjective criteria for the selection of grand jurors[3] are also attacked.

The sole issue before me at this time is whether the plaintiffs have raised substantial constitutional questions requiring a three-judge court to be designated to hear the application on the merits.

This case involves the question of whether the criminal anarchy laws of New York violate the First, Fifth and Fourteenth Amendments to the Constitution, and in my view this question is substantial. See, *e.g.*, Harris v. Younger, ____ F. Supp. ____ (C.D. Cal., Mar. 11, 1968) (three-judge court); Baker v. Binder, 274 F. Supp. 658 (D. Ky. 1967) (three-judge court); Ware v. Nichols, 266 F. Supp. 564 (D. Miss. 1967) (three-judge court). Although the Supreme Court held in Gitlow v. New York, 269 U.S. 652 (1921) that a conviction under Sections 160 and 161 for mere advocacy of criminal anarchy was constitutional, it is clear from subsequent Supreme Court decisions that *Gitlow*, though never expressly overruled, is no longer the law. See, *e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951). In such circumstances, reconsideration of the constitutionality of these provisions by a three-judge court is not foreclosed. See Harris v. Younger, *supra*.

The recent reinterpretation of the criminal anarchy laws by the New York Court of Appeals in People v. Epton, 19 N.Y.2d

[3] Section 609(1) requires special investigation by the County Clerk of potential grand jurors. Section 661 provides for questionnaires to be filled out by prospective grand jurors, and, prior to September 1, 1967, it specifically provided for questions as to the two hundred and fifty dollars property requirement.

496, 281 N.Y.S.2d 9 (1967), cert. denied and appeal dismissed sub nom Epton v. New York, 390 U.S. 29 (1968) (per curiam), does not alter this conclusion. The effect of the *Epton* case upon the plaintiffs' claims has not been considered on the merits by the Supreme Court or by the courts of this circuit.[4]

It also appears that the Fifth and Fourteenth Amendment issues raised with respect to the New York Grand Jury statutes may not be insubstantial. It may be noted in this connection that the Court of Appeals of this circuit in Chestnut v. New York, 370 F.2d 1 (2d Cir. 1966), specifically left open the constitutionality of Sections 596 and 609, and characterized these constitutional issues as "very serious" ones. 370 F.2d at 7.

Defendants argue that the abstention doctrine should be applied in this case. With respect to plaintiffs' attack on the criminal anarchy statutes, the recent decision in Zwickler v. Koota, 389 U.S. 241 (1967), indicates that abstention may not be appropriate. In any event the question of abstention under the circumstances here is one to be determined by the three-judge court and not by the District Court to whom the application is originally made.

In short, I find that the plaintiffs have made a sufficient showing to warrant the convening of a three-judge statutory court under 28 U.S.C. §2281.

I have duly notified the Chief Judge of this Circuit to this effect pursuant to 28 U.S.C. §2284.

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[4] The Supreme Court dismissed the appeal in *Epton* for want of a substantial federal question. This disposition is not decisive here since in that case Epton was sentenced to serve three concurrent terms, only two of which brought the anarchy statutes into question. See *Epton* v. *New York*, 390 U.S. at 29-30 (concurring opinion). See also *id.* at 30-35 (dissenting opinion).

Memorandum Opinion of Bryan, D.J.

There is one further detail. One of these two actions Fernandez v. Mackell, 68 Civ. 1176, was originally brought in the Eastern District of New York and was transferred to this court with the consent of the court and of the parties. Since it presents the same issues as Samuels v. Mackell, 68 Civ. 1030, originally commenced in this court and was argued before me at the same time, the two actions are consolidated for all purposes.

It is so ordered.

Dated: New York, N.Y.
April 9, 1968

Frederick vP. Bryan
United States District Judge

Answer of Louis J. Lefkowitz

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Louis J. Lefkowitz, Attorney General for the State of New York, defendant herein, appearing pro se, as and for his answer, respectfully alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 10, 11, 12, 13 and 14.

2. Denies knowledge of information sufficient to form a belief as to the allegations in the complaint contained in paragraph 1.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens found an indictment against these plaintiffs and others.

4. Denies each and every allegation contained in the complaint in paragraph 9 thereof except admits that on or about January 17, 1968 the aforesaid grand jury found a superseding indictment bearing number 134-68 against the aforesaid plaintiffs and others.

WHEREFORE the defendant Louis J. Lefkowitz respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

Louis J. Lefkowitz
Attorney General of the State
of New York
Appearing pro se
80 Centre Street
New York, New York

Answer of Thomas J. Mackell

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, as and for an answer, alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 10, 11, 12, 13 and 14.

2. Denies knowledge of information sufficient to form a belief as to the allegations in the complaint contained in paragraph 1.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens found an indictment against these plaintiffs and others.

4. Denies each and every allegation contained in the complaint in paragraph 9 thereof except admits that on or about January 17, 1968 the aforesaid grand jury found a superseding indictment bearing number 134-68 against the aforesaid plaintiffs and others.

WHEREFORE the defendant Thomas J. Mackell respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

Peter J. O'Connor
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

Motion for Summary Judgment

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

SIRS:

Please take notice that upon the annexed affidavit of Victor Rabinowitz, duly sworn to the 6th day of May, 1968, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this court on the 17th day of May, 1968, at the Courthouse thereof, Foley Square, Room 1505, at 10:30 o'clock in the forenoon, for summary judgment against the defendants pursuant to Rule 56 of the Rules of Civil Procedure:

1. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions of plaintiffs thereunder;

2. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from continuing to prosecute the plaintiffs herein under the First, Second, Third, Fourth, Sixth and Seventh counts of the indictment, a copy of which is annexed to the complaint herein.

3. Declaring former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York to be null and void on their face and as applied to the defendants herein, on the ground that they are in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and further on the ground that they have been superseded by the Smith Act, 18 U.S.C. §2385.

4. Declaring former sections 596 and 609 of the Judiciary Law of the State of New York to be null and void on their

face and as applied to the indictment of the plaintiffs herein, being in violation of the Fourteenth Amendment to the Constitution of the United States.

5. Directing such other and further relief as to the court may seem just and proper.

Dated, New York, N.Y., May 6, 1968.

Rabinowitz & Boudin
Attorneys for Plaintiffs
30 East 42nd Street
New York, N.Y. 10017

TO:

Louis J. Lefkowitz
Attorney General, Defendant
80 Centre Street
New York, N.Y.

Peter J. O'Connor and
Sidney Baumgarten
Attorneys for Defendant
Criminal Court
125-01 Queens Boulevard
Kew Gardens, New York

Affidavit of Victor Rabinowitz in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

State of New York)
County of New York) ss.:

Victor Rabinowitz, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above matter and make this affidavit in support of a motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment permanently enjoining the prosecution of the plaintiffs for criminal anarchy, declaring the Criminal Anarchy Law of New York to be unconstitutional and further declaring former sections 569 and 609 of the Judiciary Law of the State of New York to be null and void.

There is now pending before this court a motion for a preliminary injunction against the prosecution of plaintiffs. All of the papers heretofore submitted to the court on that motion are incorporated herein by reference.

This motion is made because it appears that there are no issues of fact which need be tried and that the issues on the motion for a preliminary injunction and those on the motion for summary judgment granting final relief will be substantially identical. Much time and effort on the part both of the court and the parties will therefore be saved if the court considers the proceeding on the merits at the present time.

Affidavit of Victor Rabinowitz in Support of Plaintiffs' Motion

There are no facts in dispute in this proceeding. The only allegations of the complaint which have been denied are those allegations which are conclusory, such as paragraph 4 of the complaint, which sets forth the grounds of the jurisdiction of this court and the several paragraphs of the complaint which assert that the statutes upon which the Queens prosecution is based are unconstitutional. The only issue of significance in this proceeding is a legal issue.

WHEREFORE, plaintiffs pray judgment as set forth in the notice of motion.

/s/ Victor Rabinowitz

(Sworn to May 6, 1968.)

**Statement Pursuant to General Rule 9(g)
in Support of Plaintiffs' Motion**

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Plaintiffs contend that there is no general issue to be tried as to the following facts:

1. Plaintiffs are black citizens of the United States and residents of the State of New York.

2. Defendant Thomas J. Mackell is District Attorney for the County of Queens in the City and State of New York.

3. Defendant Louis J. Lefkowitz is Attorney General of the State of New York with power and duty to appear in litigation in which a question of constitutionality of a state statute is raised.

4. On or about June 12, 1967, the Grand Jury of Queens County found an indictment against the plaintiffs and others charging them with violation of former sections 160, 161, 163 and 580(1) of the Penal Law of New York.

5. Thereafter the defendant Mackell caused the plaintiffs and others named in the indictment to be arrested and to be arraigned in the Supreme Court of the State of New York in Queens County.

6. Upon the arraignment of said plaintiffs, the defendant Mackell issued numerous press releases and other public statements relating to the indictment and the rest of the plaintiffs, which releases and statements were widely reported in newspapers throughout the State of New York.

Statement Pursuant to General Rule 9(g)
in Support of Plaintiffs' Motion

7. Thereafter and on or about January 10, 1968, demurrers to certain counts of the indictment were sustained by the Supreme Court of the State of New York, County of Queens, and the indictment was dismissed.

8. On or about January 17, 1968, the Grand Jury of Queens County found a superseding indictment bearing No. 134-68.

9. That the indictment attached to the complaint is an accurate copy of said superseding indictment.

10. The Grand Jury which returned the aforesaid indictment, was selected, drawn and summoned pursuant to sections 596 and 609 of the Judiciary Law of the State of New York.

Rabinowitz & Boudin
Attorneys for Plaintiffs
30 East 42nd Street
New York, N.Y.

Amended and Supplemental Answer of Thomas J. Mackell and Louis J. Lefkowitz

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, and Louis J. Lefkowitz, Attorney General of the State of New York, defendant, appearing pro se, as and for an amended and supplemental answer allege:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

Paragraph 5: The system of selecting grand jorors in the County of Queens is non-discriminatory.

Paragraph 6: All citizens in the County of Queens over the age of 21 and not disqualified by reason of mental or physical disability are eligible to serve as grand or petit jorors.

Paragraph 7: There is no class of citizens in the County of Queens who are discriminated against insofar as jury service is concerned by the terms of the statute.

WHEREFORE the defendants Thomas J. Mackell and Louis J. Lefkowitz respectfully pray for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

Peter J. O'Connor
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

Louis J. Lefkowitz, Attorney
General of the State of New York
80 Centre Street
New York, New York

Affidavit of Paul Livoti

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title]

State of New York)
County of Queens) ss.:

I, Paul Livoti, being duly sworn, depose and say:

1. I am the County Clerk of the County of Queens, State of New York and have been such since 1938.

2. As the Clerk of Queens County, it is my duty to provide jurors for the trial of all cases requiring jury service in Queens County.

3. In pursuance of such duty it has always been my practice to obtain jurors, both petit and grand, from the list of registered voters of Queens County.

4. In order to procure as broad-based a representation as possible, various plans have been experimented with and employed. For instance, at one time, selections were made from two or three non-contiguous assembly districts on an annual basis. This was not found to be altogether satisfactory because of problems arising out of the tendency of ethnic groups to localize themselves. Today we cover the entire County by taking each tenth election district from each assembly district. This procedure takes six to seven years to cover every registered male voter in the County. This I have found offers the best possibility of obtaining the most diversified collection of

prospective jurors, representative of all ethnic groups in the entire County.

5. I estimate that annually, in order to supply the needs of Queens County, approximately 60,000 prospective jurors are summoned for examination and service. From this amount there is normal attrition consisting of removals, exempts, physically disabled and those who, for legal excuses obtain relief from service.

6. These approximately 60,000 prospective jurors are required to present themselves at my office in order to satisfactorily qualify. Among the questions formerly put to each, until the recent change in the law, is the one which I am advised is the main contention raised in the instant attack upon the former statute, namely, whether or not the prospective juror is the possessor of two hundred and fifty dollars ($250.00) in real or personal property. I state on information and belief that in my 30 years experience interviewing the aforesaid number each year there has never been a single individual responding by subpoena who has been rejected or disqualified from service as a trial or grand juror solely by reason of not having the aforesaid sum, either in real or personal property. There has been, in the past, out of this huge number, perhaps a few instances where an individual might have said that he lacked that sum. But when he was asked whether he considered the value of his personal property, such as clothing, household equipment and all other types of personal possessions, it became apparent to him that he was the possessor of that amount and in each case he was accepted as a prospective juror.

7. The list of grand jurors which has been maintained at 750 but is now required to be maintained at 1500 by January 1, 1969, is obtained from the list of trial jurors who have been

accepted for service as such, the great majority of whom have already served. The requirements for grand jury service are no different generally from those of a trial juror except that each grand juror is required to state that he has no objection to the death penalty as now provided by law. Furthermore, each juror is advised and he must state that he has no objection to the Fifth Amendment and must have no prejudice against any law which would prevent finding a defendant guilty of violation of such law.

8. Of course, certain trial jurors are prohibited from acting as grand jurors. Reference is made specifically to city, county, state and federal employees.

9. It is my intention and purpose, just as in the case of trial jurors, to make the scope of the list of grand jurors as broad as possible in terms of county distribution. In this regard, I wish to inform this Court that I have made great efforts and still do to invite responsible individuals from all elements of Queens County society.

10. Annexed hereto are copies of form letters employed by me in connection with means of acquiring the services of prospective grand jurors. In preparation for the 1969 grand juror list, starting in the middle of February up to today, more than 3,000 invitations have been mailed to trial jurors and about 400 have accepted.

/s/ Paul Livoti

(Sworn to May 13, 1968.)

Form Letter Annexed to Affidavit of Paul Livoti

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE
SUTPHIN BOULEVARD AND 88th AVENUE
JAMAICA, N.Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Your request to be considered for Grand Jury Service has been placed on file.

The annual list according to law must be prepared well in advance. Inasmuch as we have many more pending applications, it will be impossible to tell when you may be called to this office for examination and qualification.

However, as vacancies occur the new applicants will be notified.

I thank you for indicating to us your civic interest in our community.

Very truly yours,

/s/ Paul Livoti

PL:fg

County Clerk.

#135

Form Letter Annexed to Affidavit of Paul Livoti

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE
SUTPHIN BOULEVARD AND 88th AVENUE
JAMAICA, N.Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Dear Sir, Madam:

Your name has come to our attention for possible Grand Jury Service.

The list for next year is now being prepared and twenty-three (23) persons will be selected for service each month. A Grand Juror is called upon to serve usually about two days a week for one month.

If you are now a resident of this county, under seventy years of age, physically fit, and have made no previous application for Grand Jury service in this county, you are invited to call at this office on or before between 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

County, City, State and Federal employees are not eligible.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

#7

Form Letter Annexed to Affidavit of Paul Livoti

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE
SUTPHIN BOULEVARD AND 88th AVENUE
JAMAICA, N.Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Sometime ago you expressed a desire to volunteer for Grand Jury Service.

If you are still interested and not more than 72 years old, you may personally call at this office on or before between the hours of 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

County, City, State or Federal employees are by law not eligible.

#131

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

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68 Civ. 1196

FRED FERNANDEZ,

Plaintiff,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Heard May 17, 1968 before:

FRIENDLY, *Circuit Judge*, BRYAN and WYATT, *District Judges*.

APPEARANCES:

Victor Rabinowitz (Rabinowitz, Boudin & Standard, New York, N.Y.), for Plaintiffs George Samuels, Abraham C. Taylor, Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Max Stanford, Merle Stewart, Hampton Woodward Rockward, Ursula Virginia West and Milton Ellis.

Eleanor Jackson Piel, New York, N.Y., for Plaintiff Fred Fernandez.

Peter J. O'Connor, Queens, N.Y. (Mortimer Sattler, Ass't Attorney General of New York State, New York, N.Y., Patrick J. Broderick on brief), for Defendants Thomas J. Mackell and Louis J. Lefkowitz.

FRIENDLY, *Circuit Judge:*

Plaintiffs in these consolidated actions[1] are the subjects of a superseding indictment filed by a grand jury in the Supreme Court for Queens County, New York. The indictment contains 48 counts, many of these being against only one or some of the plaintiffs. Forty-one counts charge violations of former New York Penal Law §1897[2] relating to the possession of weapons. Another count alleges conspiracy to commit arson in the third degree, Penal Law §223. What concerns us are counts charging criminal anarchy.

The first count alleges advocacy of criminal anarchy in violation of §§160 and 161-1, see fn. 4, in that defendants advocated orally and in writing the overthrow of the governments of the State and its political subdivisions "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transpor-

tation facilities, and l against executive officials of said State and its various political s subdivisions and agencies, including peace officers thereof, and l by assassination of said executive officials, and by other unlaw ful means and with the further intent that said acts be presentl ly attempted and accomplished." The second count asserts that, i n violation of §§160 and 160-2, defendants published and circul lated certain printed matter urging the vio lent overthrow of th e State and its political subdivisions and agencies "by force a and violence, to wit, by sabotage of public transportation and c ommunication facilities, assassination of police officers of sa id State and its various political subdivisions and agencies, and m embers of the State Guard of said State, and by other unlaw ful means, and with the further intent that said acts be presentl ly attempted and accomplished." The third count charges that, i n violation of §§160 and 161-4, defend ants organized and j helped to organize and became members of and voluntarily asse mbled with each other in a society formed to teach and advoca te the doctrine that the governments of New York and its v arious political subdivisions and agencies be overthrown by force and violence as described in the first count. The fourth c ount alleges a conspiracy to commit the crime alleged in the first three, Penal Law §580. Two other counts charge that S amuels and Stewart permitted premises to be used for the asse mblage of persons assembled for the purpose of advocating and t eaching that the governments of the State and its various polit ical subdivisions and agencies should be overthrown by force and violence.

The complaint , based in part upon the Civil Rights Act, 42 U.S.C. §1983, s eek an injunction against prosecution under the indictment or, a lternatively, a declaratory judgment of in validity, on the grou nds that the New York criminal anarchy

statute, Penal Law §§160, 161 and 163, violated the First Amendment of the Constitution of the United States, made applicable to New York by the Fourteenth, and entered an area exclusively occupied by the Federal Government, see Pennsylvania v. Nelson, 350 U.S. 497 (1956). They also attack §596.3 of New York's Judiciary Law requiring that a juror "be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value" as violating requirements of the Federal Constitution that a person may be indicted only by a grand jury representing a fair cross-section of the community,[3] and §586.6, now §596.5, of the Judiciary Law in that it furnished no definable standards as to how grand jurors were to be selected. The defendants answered, seeking dismissal of the complaints. Finding that the complaints raised substantial questions under the Constitution, Judge Bryan requested the convocation of a court of three judges, 28 U.S.C. §§2281 and 2284. We now have before us motions by the plaintiffs both for a preliminary injunction against continuation of the prosecution and for summary judgment.

The New York criminal anarchy statute is an old one, going back to 1902. Its enactment was a response to the assassination of President McKinley in Buffalo the preceding year, see People v. Gitlow, 234 N.Y. 132, 156 (1922) (dissenting opinion of Judge Pound). The language was very broad. Section 160 defined criminal anarchy:

> Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.

and made "the advocacy of such doctrine either by word of mouth or writing" a felony, without, however, prescribing a penalty. Section 161[4] spelled out various types of acts within this general concept which constitute felonies punishable by imprisonment for not more than 10 years, fine of not more than $5,000, or both. Section 162 forbade assemblages of two or more persons for advocating or teaching criminal anarchy, and §163 forbade permitting such an assemblage—this being a misdemeanor punishable by imprisonment for not more than 2 years, fine of not more than $2,000, or both. Under the new Penal Law, effective September 1, 1967, the various criminal anarchy sections are combined in a single provision reading as follows:

> §240.15 Criminal anarchy
>
> A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

Plaintiffs mount a double-barreled attack on the old statute. They say that although its constitutionality was sustained in Gitlow v. New York, 268 U.S. 652 (1925), over a dissent by Justices Holmes and Brandeis, later decisions of the Supreme Court, notably Dennis v. United States, 341 U.S. 494, 507-11 (1951), and Yates v. United States, 354 U.S. 298, 318-19 (1957), render it plain that *Gitlow* has been overruled and that a statute making the teaching or advocacy of anarchy a

crime can be constitutional only if limited to those words or acts aimed at the violent overthrow of government which, as said in Schenck v. United States, 249 U.S. 47, 52 (1919), create "a clear and present danger that they will bring about the substantive evils" the legislature "has a right to prevent"—as, indeed, the New York Court of Appeals has recently recognized. People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed for want of a substantial federal question, 390 U.S. 29 (1968). They add that the unconstitutionality of §§160-163 would not be removed even if—as they dispute—the instant indictment required proof of facts within the *Schenck-Dennis* formulation, since the overbreadth of the statute would have a "chilling effect" on persons desiring to engage in teaching or advocacy in the area between the central core that might be constitutionally forbidden and the broader circumference to which the statute extends. For this they find support in such decisions of the Supreme Court as Dombrowski v. Pfister, 380 U.S. 479 (1965), and Keyishian v. Board of Regents, 385 U.S. 589 (1967), and in the decisions of three judge courts invalidating the Mississippi, Kentucky and California Criminal Syndicalism Acts, Ware v. Nichols, 268 F. Supp. 564 (D. Miss. 1967); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968). They contend in addition that the language of the former New York statute was broad enough to include teaching or advocating the overthrow of the Federal Government, a field held in Pennsylvania v. Nelson, *supra*, to have been preempted against the states by the Smith Act, 18 U.S.C. §2385; indeed they point to a passage in one of the two majority opinions of the Court of Appeals in *Gitlow* which construed New York's criminal anarchy statute as extending that far, 234 N.Y. at 138 (opinion of Judge Crane). Against the point that

the superseding indictment charged only attempting to overthrow state and local governments, they again argue overbreadth.

The State responds that, however all this might have been if the case had come to us some years back, plaintiffs' arguments are drained of their force by the decision of the Court of Appeals in *Epton*. Taking note of constitutional development in the forty-five years since its decision in People v. Gitlow, *supra*, that court, with Judge Burke dissenting, reinterpreted the criminal anarchy statute "in accordance with sound constitutional principles so as to preserve its constitutionality," 19 N.Y. 2d at 505, 281 N.Y.S. 2d at 16. It held that the statute must be read as requiring not merely advocacy or teaching of violent overthrow of the government by force and violence but an intent to accomplish the overthrow and a "clear and present danger" that the advocated overthrow may be attempted or accomplished, 19 N.Y. 2d at 506, 281 N.Y.S. 2d at 17.[5] It held also, as we read the opinion, 19 N.Y. 2d at 507, 281 N.Y.S. 2d at 17-18, that, as the new Penal Code makes plain, the old statute also must be confined to attempted overthrow of the government of New York or a local subdivision, thereby saving it from successful attack on preemption grounds, Uphaus v. Wyman, 360 U.S. 72, 76-77 (1959); DeGregory v. Att'y General of New Hampshire, 383 U.S. 825, 829-30 (1966).

Far from welcoming this restriction of the area of permissible prosecution under the criminal anarchy statute, the plaintiffs protest it. They contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading than the same court had found in 1922 to be the intent of the legislature of 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted

all it could have. Time and again the Supreme Court has narrowed the language of Congressional acts to save their constitutionality, see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943), Bridges v. Wixon, 326 U.S. 135 (1945), and, most notably in the present context, in the case of the Smith Act whose language is nearly identical with the New York statute, see Dennis v. United States, *supra*, 341 U.S. at 502-11. We are unable to discern why an earlier broader reading should bar that course. In any event if the Court of Appeals transcended the powers vested in it by the people of New York by narrowing its previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern.

Plaintiffs argue further, relying particularly on Dombrowski v. Pfister, *supra*, that, even if *Epton* would be a sufficient answer as to future criminal activity, the New York statute had not been thus narrowed to constitutionally permissible limits when most of the acts charged in the indictment were committed. The State counters that *Dombrowski* dealt with a situation where the statute could be brought within acceptable limits only "through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard," 380 U.S. at 491. The Court, it says, there made clear it was speaking only of a case where "the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," whereas here the Court of Appeals' adoption of the Supreme Court's reading of similar statutory language in *Dennis* was precisely such a construction and the acts are "the sort of 'hard-core' conduct that would obviously be prohibited under any

construction." 380 U.S. at 491-92. The State caps its argument by citing a footnote in *Dombrowski* where the Court added, 380 U.S. at 491 n. 7:

> Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct prior to the construction, see Poulos v. New Hampshire, 345 U.S. 395; Cox v. New Hampshire, 312 U.S. 569; Winters v. New York, 333 U.S. 507, provided such application affords fair warning to the defendants, see Lanzetta v. New Jersey, 306 U.S. 451; cf. Harrison v. NAACP, 360 U.S. 167, 179.

Plaintiffs contend that as to them the proviso as to "fair warning" was not met. In one sense it clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the "hard-core" activities with which they are charged. Cf. Winters v. New York, 333 U.S. 507 (1948). Although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one; the case differs essentially from the unduly vague statute like that in Lanzetta v. New Jersey [belonging to a "gang"], which the Court's footnote cited as an example. Plaintiffs' point is a rather different one. Until *Epton*, they say, they had every reason to believe the New York criminal anarchy statute as construed by the Court of Appeals in *Gitlow* was unconstitutional. The *Dennis* opinion indicated this, no attempt at enforcement or amendment had been made thereafter, and they could not reasonably have anticipated that the Court of Appeals by overruling its earlier decision would restore life to an act that was moribund. Although under *Dombrowski* persons engaging in "hard-core" activities take their chances on "an acceptable limiting construction readily to be anticipated as the result of a single criminal

prosecution," it is unreasonable, they say, to apply this rule when the statute has once been broadly construed by the highest court of the state even though—or perhaps particularly because—that construction would render the statute void under current constitutional doctrine.

The argument strikes us as somewhat artificial. The case is not like James v. United States, 366 U.S. 213, 221-22, 241, 242-47 (1961), where defendants were charged with wilfully failing to report income resulting from embezzlement which an earlier decision, never expressly overruled, had held they were not required to report. No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity. The alleged non-enforcement of the New York criminal anarchy statute did not have the effect that might reasonably have been attributed to Connecticut's "undeviating policy" of non-enforcement of its anti-contraceptive statute in the face of flagrant violation, which could well have led citizens to believe they could flout the statute without risk of prosecution. See Poe v. Ullman, 367 U.S. 497, 502 (1961). Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously impute to them and, for reasons indicated, we do not understand why the *Epton* decision was not expectable. In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record, see Eccles v. People's Bank, 333 U.S. 426, 434 (1948) (Frankfurter, J.); Wright, Federal Courts 391-92 (1963), cf. Bickel, The Least Dangerous Branch, ch. 4 (1962); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), and would afford no basis for declaratory or, *a fortiori*, injunctive[7] relief.

Even if we should be wrong on this last point or as to plaintiffs' other arguments that *Epton* could not validate application of the old statute to them, see footnote 5, we would still consider the grant of such relief inappropriate under the special circumstances here presented. In saying this we are fully aware of the directives recently given by the Supreme Court, not only in Dombrowski v. Pfister, *supra*, but also in such cases as McNeese v. Board of Education, 373 U.S. 668 (1963), and Zwickler v. Koota, 389 U.S. 241 (1967), see also Cameron v. Johnson, 390 U.S. 611 (1968). However, the common thread running through all these cases—the need of federal declaratory or injunctive relief to protect plaintiffs' constitutional rights with respect to future conduct or events—is wholly absent here. The presently effective New York criminal anarchy statute, Penal Law §240.15,[8] read in light of *Epton*, does not unconstitutionally restrict the First Amendment rights of these plaintiffs or of anyone else. We do not think that the Court in *Zwickler* had any intention to overrule the basic principles governing the propriety of declaratory or injunctive relief and to require a federal court to render a declaratory judgment whenever a present or prospective defendant shows that application of a state criminal statute to him would violate a constitutional right, even though there is no possibility that presenting the defense in a pending prosecution and seeking review in the Supreme Court if it is there rejected would "effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252. Such a view would run directly counter to the discussion in *Dombrowski*, 380 U.S. at 483-85. See also Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952); Borchard, Declaratory Judgments 1022 (2d ed. 1941). *Zwickler* was a classic case for declaratory relief: the plaintiff needed to know promptly

whether he could distribute anonymous handbills free of New York's threat of punishment. But, with New York law changed as it has been, the instant plaintiffs will not suffer any impairment of First Amendment rights to denounce the government of the state or its subdivisions if they must wait for a federal answer as regards conduct long since past until the state has determined what acts, alleged to be punishable under the statute and the Constitution, they have in fact committed. While their prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief. See also Zwicker v. Boll, 36 L.W. 3440-41 (May 20, 1968).

We are not persuaded to a different view by plaintiffs' apprehension that if they should be found guilty on other counts of the indictment, New York might seek to frustrate an appeal to the Supreme Court, as they contend it did in *Epton*, by making their sentences on the criminal anarchy counts concurrent with those on other counts. Not only is this entirely speculative but even if New York should do what plaintiffs fear and the Supreme Court should dismiss their appeal as it did in *Epton*, the Court would do that only because it felt there was no cause for federal concern. New York would have punished the plaintiffs for crimes—illegally possessing weapons and conspiring to commit arson—within its power, and, in light of the new statute and *Epton*, its doing so would have no "chilling effect" on persons desiring now or in the future to teach or advocate the overthrow of government within constitutional bounds. Plaintiffs' fear that New York will use an overbroad criminal anarchy statute in bad faith as a weapon for restraining constitutionally protected speech, while avoiding Supreme Court review, ignores that New York

cannot do this so long as *Epton* stands. In contrast to Keyishan v. Board of Regents, *supra*, we do have the benefit of a "judicial gloss," 385 U.S. at 601—and of a greatly simplified statute as well.

There remain the plaintiffs' two challenges, going to the entire indictment, which concern New York's method of selecting grand jurors. We have little doubt that, despite the decision of this court in United States v. Foster, 83 F. Supp. 197 (S.D. N.Y. 1949), cf. Fay v. New York, 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennet, 365 F. 2d 698, 723 (5 Cir. 1966), cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), and New York has acted wisely in abolishing it, see fn. 3. However, the defendants have submitted an affidavit by the County Clerk of Queens County that the property requirement had no significance in his selection of jurors since he has long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property specified. We find far less force in plaintiffs' attack on former subdivision 6, now 5, of §596 of the Judiciary Law providing that to serve as a grand juror, a person must ". . .be intelligent; of sound mind and good character; well informed. . . ," in the absence of evidence of abuse, see Swain v. Alabama, 380 U.S. 202, 205-06, 209 (1965); Chestnut v. New York, 370 F. 2d 1, 7 at n. 13 (2 Cir. 1966), cert. denied, 386 U.S. 1009 (1967). Rabinowitz v. United States, 366 F. 2d 34 (5 Cir. 1966), on which plaintiffs rely, did not hold such standards to be unconstitutional; the decision went rather on the ground that the clerk and the jury commissioner had superimposed additional standards of their own,

designed in part to diminish the number of negro jurors, on the uniform standards enacted by Congress in 1957, 28 U.S.C. §1861. However all this may be, we see no reason why plaintiffs' contentions as to grand jury selection cannot be effectively presented in the New York courts and to the Supreme Court on review. Douglas v. City of Jeannette, 317 U.S. 157 (1943); Stefanelli v. Minard, 342 U.S. 117 (1951). Indeed, these questions, going to the validity of this and many other indictments, seem peculiarly a matter to be determined by the state courts in the first instance. Chestnut v. New York, *supra*, 370 F. 2d at 6-8; U.S. ex rel. Epton v. Nenna, 281 F. Supp. 388, 390 (S.D.N.Y. 1968).

Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed by the State.

/s/ Henry J. Friendly
U.S.C.J.

/s/ Frederick v. P. Bryan
U.S.D.J.

/s/ Inzer B. Wyatt
U.S.D.J.

26 June 1968.

JUDGMENT ENTERED 6-27-68

/s/ John J. Olear, Jr.
Clerk

Opinion of the District Court

Footnotes

1 The Fernandez action was brought in the Eastern District of New York and transferred here by consent.

2 All references are to the former Penal Law, repealed September 1, 1967, unless otherwise stated.

3 Since subdivision 3 was repealed, effective September 1, 1967, plaintiffs' attack is necessarily limited to the State grand jury. Although the superseding indictment was filed thereafter, counsel advised us that this was returned by the same grand jury that had rendered the original indictment.

4 Sec. 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrine of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

5 We reject plaintiffs' claims that, even after *Epton*, the statutes under which they have been indicted are still unconstitutionally vague in scope. Four of their arguments merit discussion. First, while *Epton* does not expressly state that only when the speaker uses language that *incites to action* may he be prosecuted under Secs. 160 and 161, see Yates v. United States, *id.* at 320-25,

Footnotes *(Cont'd)*

in the *Gitlow* case itself, both the Court of Appeals, 234 N.Y. at 149, and the Supreme Court, 268 U.S. at 664-65, so construed the statute. Though the indictment in the present case does not expressly charge incitement—indeed its charge that the defendants advocated the "duty" and "necessity" of overthrow was expressly held inadequate in *Yates, id.* at 324—it is the indictment, not the statute, that is overly broad in this respect. Second, while the Court of Appeals did not expressly deal with those clauses in Secs. 160 and 161 that prohibit the advocacy of overthrow "by any unlawful means" other than force and violence, the fair implication is that these provisions have been read out of the statute. Third, we think it apparent that the same principle of construction applied in *Epton* would limit the relevant portion of Sec. 161-4 to becoming a member with knowledge that the society advocates the overthrow of government by force and violence and intends that this be accomplished. Contrast United States v. Robel, 389 U.S. 258 (1967). Finally, while the *Epton* court had no occasion to construe old Sec. 163 which forbade any owner, agent or occupant "willingly and knowingly" to permit two or more anarchists the use of premises under his control, it follows under the principles of the *Epton* decision that to violate Sec. 163 one must know of the present danger of violence.

6 While Epton necessarily decided this issue adversely to the plaintiffs' argument, we cannot be certain whether the Supreme Court in dismissing the appeal, 390 U.S. 29, passed on that point or rested decision on the concurrent sentences on other counts.

7 The question whether the provision in the Civil Rights Act, now 42 U.S.C. Sec. 1983, authorizing a "suit in equity," brings that statute within the exception of the anti-injunction statute, 28 U.S.C. Sec. 2283, "except as expressly authorized by Act of Congress," is one of great consequence on which inferior federal judges have sharply differed and the Supreme Court has not found occasion to rule. See Dombrowski v. Pfister, *supra*, 380 U.S. at 484 n. 2; Cameron v. Johnson, 381 U.S. 741 (1965) and 390 U.S. 611 n. 3 (majority opinion) and n. 5 (dissenting opinion) (1968). Cf. City of Greenwood v. Peacock, 383 U.S. 808, 829, 852-53 (1966). The American Law Institute has proposed a much more limited exception, Study of the Division of Jurisdiction between State and Federal Courts, Sec. 1372(7), Tent. Draft No. 6 (1968).

8 The new statute, among other things, eliminates the "any unlawful means" language of Sec. 161-1 and 2, and the assemblage clause, Sec. 163, and makes clear that membership is punishable only if accompanied by knowledge of the organization's purpose to advocate violent overthrow—in the *Epton* sense.